In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 886

CARL W. EVANS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

On June 29, 1970, petitioner was convicted in the Southern District of New York for embezzlement from the mails. He was sentenced as a young adult offender and placed on probation for two years. Notice of appeal was filed by present counsel on July 7, 1970.

On July 10, 1970, petitioner's trial counsel moved to be released and on July 20 petitioner's present counsel consented to be substituted (App. D, p. A-11).* By order dated July 24, 1970, Judge Feinberg signed an order substituting present counsel and dismissing an erroneous notice of appeal filed by trial counsel. The order provided that appellant should docket the

*App. — refers to appendices to the petition on file with the Court.

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record on or before August 17 and file his brief by September 28; if the time schedule was not met, the clerk was directed to dismiss the appeal forthwith (App. E., pp. A–13–14). On August 18, the record not having been docketed, the appeal was accordingly dismissed (App. F., p. A–15).

Without reference to the order of dismissal, petitioner's counsel and the United States Attorney stipulated on August 25, that the time to docket the record be extended to September 1, 1970, on the ground that the minutes of sentencing had not been received. Judge Lumbard entered "so ordered" on the stipulation (App. G, pp. A–16–17) but vacated his order on September 24, 1970, after learning that the appeal had already been dismissed (App. B., p. A–2).

Petitioner moved to vacate that order. In an affidavit, his counsel alleged that, when he left the city on August 7, he instructed his associate to file the record in the court of appeals as soon as the minutes of the sentencing were received; that he had expected to receive the minutes before August 18, but that because of an error they were not received until August 25; that the associate had erroneously assumed that he had until September 10 to file the record. He stated that when the stipulation as to the record was drawn he was unaware that any order had been entered dismissing the appeal. One of the issues he said he intended to raise, to which the sentencing minutes were pertinent, was petitioner's competence to stand trial (App. C., pp. A–4–8). In a supplemental affidavit, counsel stated that he was not aware of, and

did not find in his files, a copy either of the order of July 24, 1970, directing that the appeal be dismissed if the record was not filed by August 17, or the order of August 18 dismissing the appeal (Pet. App. C., pp. A–9–10). The motion to reinstate the appeal was denied by Judge Lumbard on October 1, 1970 (App. A., p. A–1). Petitioner seeks review of that order.

This appears to be a matter within the proper area of discretion of the court of appeals. Though the result may be harsh, it cannot be said that that court abused its discretion in declining to reinstate the appeal. The case apparently involved a series of unfortunate errors by petitioner's counsel, but the facts were developed before the chief judge of the court of appeals, and he did not consider it appropriate to condone petitioner's failure to meet the time standards which had been prescribed. Since petitioner had not complied with Rule 11(a) of the Rules of Appellate Procedure, under which the record was due on August 17, it was within the discretion of the court of appeals to conclude that the facts here did not justify entertaining this untimely appeal.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

NOVEMBER 1970.

U.S. GOVERNMENT PRINTING OFFICE: 1970